UT 03-2
Tax Type: Use Tax
Issue: Use Tax On Aircraft Purchase

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS

v.

JOHN DOE, M.D.,

Taxpayer

No. 02-ST-0000
IBT# 0000-0000
NTL#00 0000000000000

Ted Sherrod
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General George Foster on behalf of the Illinois Department of Revenue; Michael Dietchweiler, LaBeau Dietchweiler & Associates, on behalf of John Doe, M.D.

Synopsis:

This matter comes on for hearing pursuant to the taxpayer's protest of Notice of Tax Liability 00 0000000000000, issued by the Illinois Department of Revenue ("Department") for use tax on the purchase of a 1977 or 1978 Piper Aztak aircraft. At hearing, the following issues were raised: (1) whether the taxpayer owned the aircraft; (2) whether the purchase qualified for exclusion from tax as an occasional sale; and (3) whether the purchase price used by the Department to compute the tax was correct. After reviewing the record, it is recommended that the imposition of tax be upheld, but that the amount be reduced to reflect a modified purchase price of $90,000.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Audit Correction and/or Determination of Tax Due ("Correction of Return") for the period December 12, 1997 for use tax due on a sale, plus penalties totaling $10,234. Dept. Ex. 1.[1]
2. John Doe, M.D. is a resident of Illinois, residing in Anywhere, Illinois. Tr. p. 61.
3. Anywhere, Inc. ("Anywhere") is a corporation based in Anywhere, Illinois. Dr. Doe is the sole shareholder, director and officer of this corporation. Tr. pp. 9, 63; Taxpayer Ex. 9.
4. ABC Inc.. is a corporation based in Anywhere, Illinois. Dr. Doe is the owner of this corporation. Tr. p. 129; Taxpayer Ex. 17.
5. Joe Blow is an employee of Anywhere. Mr. Blow is a U.S. Federal Aviation Administration ("FAA") licensed airline transport pilot, a licensed pilot examiner and a licensed airplane engine mechanic. He was also certified as a registered airplane appraiser with the National Aircraft Appraisers Association in St. Louis, Missouri from 1994 until 1997. Prior to becoming an employee of Anywhere, Mr. Blow operated several airports and was engaged in the business of purchasing, maintaining and selling airplanes, chartering aircraft, selling aircraft fuel and maintaining and selling aircraft radio equipment. These businesses were conducted by Blow Aviation, where Mr. Blow was a Vice President for 30 years. Tr. pp. 159, 160, 161.

[1] Unless otherwise noted, findings of fact apply to the tax period.

6. XYZ Industries, Inc., or XYZ Industries Inc. ("XYZ") is a manufacturing company engaged in the manufacture of vacuum cleaners, air filtration systems and health care products. It is based in Ohio. Tr. pp. 66, 67, 114; Taxpayer Ex. 21, 22.

7. AIRPLANES Corporation, a corporation with offices in , Ohio, is engaged in aircraft leasing and financing. Tr. pp. 11, 33, 34; Taxpayer Ex. 7.

8. Prior to December 12, 1997, XYZ was the owner of a twin engine 1977 or 1978 Piper Aztak, identification number XXXXX (hereinafter "Piper aircraft"). This aircraft was previously owned by XXX Industries and became the property of XYZ when XXX Industries merged with XYZ to form XYZ. Tr. pp. 65, 66, 67, 150, 151.

9. Subsequent to the merger forming XYZ, XYZ entered into a financing transaction with AIRPLANES Corporation pursuant to which XYZ sold the Piper aircraft to AIRPLANES and entered into an operating lease with AIRPLANES to lease this aircraft. Upon the termination of this lease, AIRPLANES sold the Piper aircraft back to XYZ. Tr. p. 11; Taxpayer Ex. 7, 24.

10. On February 27, 1998, AIRPLANES signed an Aircraft Bill of Sale transferring title to the Piper aircraft to XYZ. This bill of sale was recorded with the FAA at 2:53 p.m. on July 31, 1998. In connection with this transaction, XYZ gave AIRPLANES Corporation a resale exemption certificate on which it indicated that the aircraft was purchased: "to be resold to third party on transfer." This resale exemption certificate is dated November 3, 1997. The Piper aircraft was resold to Dr. Doe. Tr. pp. 150, 151, 215, 229, 230; Dept. Ex. 4; Taxpayer Ex. 7, 21, 24.

11. On December 12, 1997, XYZ executed an Aircraft Bill of Sale transferring title to the Piper aircraft to Dr. John Doe. This bill of sale was recorded by the FAA at 2:54 p.m. on July 31, 1998. Dr. Doe tendered a cashier's check in the amount of $90,000, which is dated December 12, 1997. Dr. Doe also filed an Aircraft Registration Application for the Piper aircraft with the FAA on this date. This application certifies that Dr. Doe is the owner of this aircraft and is signed by Dr. Doe. This aircraft was officially registered with the FAA in accordance with this application on July 31, 1998. Dept. Ex. 3; Taxpayer Ex. 2, 16.

12. On July 10, 1998, Avemco Insurance Company issued an insurance policy covering the Piper aircraft for the period June 12, 1998 to May 24, 1999. Anywhere Inc. is named as an insured policyholder. The policy also states: "THE PERSON OR ORGANIZATION SHOWN BELOW HAS AN INTEREST IN THE AIRCRAFT … THEY ARE AN INSURED UNDER COVERAGE A OF THIS POLICY … AND SHALL BE INCLUDED IN ANY LOSS PAYMENT MADE UNDER COVERAGE B … JOHN DOE … ." Taxpayer Ex. 9.

13. The Piper aircraft was inspected and test flown by Joe Blow, a FAA licensed airline transport pilot, a licensed pilot examiner and a licensed airplane engine mechanic. Mr. Blow found numerous defects in the aircraft. He concluded that the aircraft was below average in general appearance and condition. Tr. pp. 163, 164, 177, 178, 179; Taxpayer Ex. 20.

14. Prior to XYZ's issuance of an Aircraft Bill of Sale transferring title to the Piper aircraft, XYZ entered into an agreement with Good Aviation to perform extensive modifications to this aircraft. XYZ also entered into an agreement with Extra Good Aviation to correct defects in the Piper aircraft identified by Mr. Blow after XYZ

issued a bill of sale. XYZ was invoiced $36,316.07 for these services (including $2,363.31 for sales tax) by Good Enterprises, Inc., and $15,085.70 (including $409.51 for sales tax) by Extra Good Aviation. The modifications and repairs performed by Good Aviation and Extra Good Aviation were paid for by XYZ using a portion of the $90,000 it received from Dr. Doe. Tr. pp. 9, 10, 11, 69, 70, 71, 72, 73, 74, 114, 115, 136, 137, 138, 139, 140, 141, 142, 143, 144, 147, 148, 149, 150, 168; Taxpayer Ex. 3, 4, 20.

15. The Department was provided information concerning the sale of the Piper aircraft from the U.S. Aircraft Registry. The Aircraft Bill of Sale covering this transaction executed by XYZ on December 12, 1997 indicates that XYZ is the seller and the taxpayer is the purchaser of the Piper aircraft. The Aircraft Registration Application to the FAA executed December 12, 1997 certifies that Dr. Doe is the owner of this aircraft. This application is signed by Dr. Doe.[2] Since the taxpayer did not pay use tax on the purchase of the aircraft, the Department, on November 6, 2001, issued an SC-10-K Audit Correction and/or Determination of Tax Due showing a tax liability of $10,234 (including penalties). Tr. pp. 30, 227 228, 229, 230, 231, 232, 233, 244; Dept. Ex. 1, 3; Taxpayer Ex. 16.

16. The Department determined the selling price of the Piper aircraft by using the Aircraft Blue Book digest of aircraft prices, which showed an average retail price of $114,000 for a 1977 Piper Aztak aircraft. Since the Piper aircraft was a 1977 or 1978 Piper Aztak, the Department valued this aircraft at $114,000 in arriving at its

[2] The application signed by the taxpayer provides: "(A) false or dishonest answer to any question in this application may be grounds for punishment by fine and/or imprisonment (U.S. Code, Title 18, sec. 1001)."

assessment. The Department added the Blue Book value of "add-ons", or equipment the Department believed to be on the Piper aircraft in accordance with Department assessment procedures, in the amount of $20,200, resulting in a final assessment of $134,200 for the Piper aircraft. Tr. pp. 24, 25, 42, 43, 44, 45, 46, 47, 48, 49, 56, 57, 58, 175, 176, 177, 178, 236, 237, 238, 239, 240, 241, 242, 259, 260, 261, 262, 263; Department Ex. 5; Taxpayer Ex. 1, 11.

17. The taxpayer entered into an agreement to sell the Piper aircraft to First Interstate Leasing on August 4, 1998. Joe Blow signed an Aircraft Bill of Sale transferring title to XXX Aviation Inc. on behalf of the taxpayer, on September 17, 1998. This bill of sale indicates that the taxpayer is the seller. The conveyance of title pursuant to this bill of sale was recorded by the Federal Aviation Administration at 11:10 a.m. on September 23, 1998. The aircraft was subsequently exported to Israel pursuant to a sale agreement between the taxpayer and First Interstate Leasing. The sale price of the Piper aircraft was between $120,000 and $125,000. Tr. pp. 131, 132, 133, 215, 216; Taxpayer Ex. 19, 25.

Conclusions of Law:

The Use Tax Act, 35 **ILCS** 105/1 *et seq.* imposes a tax upon the privilege of using in Illinois tangible personal property purchased at retail from a retailer. 35 **ILCS** 105/3. If the tangible personal property is purchased from a person who does not hold himself out as being engaged or who does not habitually engage in selling such tangible personal property at retail, then the seller is not a retailer within the meaning of the Use Tax Act. 35 **ILCS** 105/2. Sales made by this type of seller are considered to be isolated or

occasional sales, and the privilege of using the property purchased from such sellers is not taxable. *Id*.

Section 12 of the Use Tax Act, 35 **ILCS** 105/12, incorporates by reference section 4 of the Retailers' Occupation Tax Act ("ROTA"), 35 **ILCS** 120/1 *et seq*. Section 4 of ROTA provides that the certified copy of the Correction of Return shall be prima facie proof of the correctness of the amount of tax due as shown therein. 35 **ILCS** 120/4. Once the Department establishes its prima facie case by submitting the Correction of Return into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. Clark Oil & Refining Corp. v. Johnson, 154 Ill. App. 3d 773, 783 (1st Dist. 1987). To prove its case, a taxpayer must present more than its testimony denying the Department's assessment. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 217 (1st Dist. 1991). Mere testimony is not enough to rebut the presumed correctness of the Department's determination. *Id*. The taxpayer must also present documentary evidence to support its claim. *Id*.

The taxpayer contends that he does not owe use tax on the purchase of the Piper aircraft because at the time of the purchase the seller, XYZ, was not engaged in the business of selling aircraft. Tr. p. 11. Dr. Doe maintains that, at the time of the sale, XYZ was exclusively engaged in the business of manufacturing vacuum cleaners and health care products. Tr. p. 66. This contention is supported by additional documents contained in the record. Taxpayer Ex. 6, 14, 21, 22. The taxpayer contends that the Piper aircraft is the only aircraft XYZ ever owned or sold. Tr. pp. 11, 123, 285, 286. Because of the lack of any volume of aircraft sales and the fact that the taxpayer did not maintain

an inventory of aircraft, the taxpayer contends that XYZ was not an aircraft retailer, and this transaction was, therefore, an occasional sale.

The Department argues that the taxpayer has failed to overcome Department's prima facie case. In support of its position, the Department cites 86 Ill. Admin. Code § 130.110(f), which provides as follows:

> When a person purchases an item of tangible personal property with the intent of reselling the item to a purchaser for use or consumption, that person engages in conduct equivalent to holding himself out as a retailer. In such a situation, the initial purchase is a sale for resale and the subsequent sale is a taxable sale at retail subject to Retailers' Occupation Tax, not an occasional sale. For example, if a hospital possessing an exemption identification number issued by the Department purchases a computer system with the intent of reselling the computer system to a group of doctors, the hospital may not resell the computer system to the group of doctors without incurring Retailers' Occupation Tax. In this instance, the hospital is holding itself out as a retailer and its sale of the computer system to the group of doctors is taxable. The hospital should provide a Certificate of Resale to its supplier on the purchase of the computer system. It is improper for the hospital to use its exemption identification number to purchase the computer system in these circumstances.

While subdivision (f) of 86 Ill. Admin. Code § 130.110 did not become effective until April 2, 2001[3], it reflects the longstanding statutory requirement under Illinois law that persons making non-exempt sales and issuing resale exemption certificates be registered as retailers. See 35 **ILCS** 105/2; 35 **ILCS** 120/2c; Dearborn Wholesale Grocers, Inc. v. Whitler, 82 Ill. 2d 471 (1980).

Under Illinois law, sellers making sales for resale must obtain resale certificates from purchasers making purchases for resale. 35 **ILCS** 120/2c. In accordance with 35 **ILCS** 120/2c, 86 Ill. Admin. Code § 130.1415 allows persons that are not registered as

[3] Subdivision (f) was added to 86 Ill. Admin. Code § 130.110 at 25 Ill. Reg. 5398, effective April 2, 2001.

retailers to issue resale certificates. However, this rule only applies to persons purchasing tangible personal property for the purpose of making exempt sales. *Id.* Hence, purchasers purchasing for resale and selling tangible personal property for use or consumption must be registered as retailers. This regulation implements 35 **ILCS** 120/2c which states that "a sale shall be made tax-free on the ground of being a sale for resale if the purchaser has an active registration number or resale number from the Department … [.]"

The rule enumerated in 86 Ill. Admin. Code § 130.110(f) is not new. See ST 00-0170-GIL; ST 99-0162-GIL. Furthermore, while 86 Ill. Admin. Code § 130.110(f) is a Retailers' Occupation Tax Act regulation, its reasoning is applicable to the facts in this case because the definition of "occasional sale" contained in the ROTA, and the Use Tax Act are virtually identical. Compare 35 **ILCS** 105/2 and 35 **ILCS** 120/1. See also 86 Ill. Admin. Code § 150.1201.

The Department points to evidence clearly establishing that XYZ purchased the Piper aircraft from AIRPLANES for the purpose of making a resale. AIRPLANES sent a letter to the taxpayer plainly indicating that the aircraft was purchased by XYZ for the purpose of being resold. Taxpayer Ex. 7. Moreover, XYZ issued a resale certificate to AIRPLANES expressly stating that the aircraft was being purchased from AIRPLANES for the purpose of resale. Dept. Ex. 4. On the resale certificate, XYZ states the following: "PURCHASE OF PIPER AZTEC (sic) PLANE TO TERMINATE LEASE. PLANE IS TO BE RESOLD TO THIRD PARTY ON TRANSFER." *Id.* As pointed out by the Department's auditor during testimony, the aircraft was purchased from XYZ by the taxpayer less than a month after it was purchased by XYZ from AIRPLANES. Tr. p.

249. Moreover, during testimony, Dr. Doe expressly stated that the aircraft was purchased from AIRPLANES by XYZ for the purpose of being resold to him. Tr. pp. 150, 151. While there is testimony that the taxpayer may have intended to ultimately resell the aircraft, the record does not support a finding that this was the primary reason the taxpayer made this purchase. Tr. pp. 134, 135, 136. Since the taxpayer, by his own admission, purchased an aircraft acquired for the express purpose of being sold to him, the record fully supports the Department's determination classifying XYZ as a retailer pursuant to the Department's regulations. Accordingly, because XYZ was properly classified as a person engaged in making retail sales under criteria enumerated in 86 Ill. Admin. Code §130.110(f), the occasional sale exemption was not applicable to the taxpayer's purchase of the Piper aircraft from XYZ.

The taxpayer also argues that the purchase of the Piper aircraft was an occasional sale transaction because the contract between the parties so provided. Tr. pp. 17, 115, 286. Numerous documents contained in the record support this claim. See Taxpayer Ex. 6, 14, 21, 22. However, as noted above, this transaction was not a non-taxable occasional sale. The intention of parties to a contract cannot make a contractual provision legally effective when it is in contravention of the law. Schnackenberg v. Towle, 4 Ill. 2d 561 (1954), cert. den. 349 U.S. 939 (1954).

The taxpayer also contends that, even if the occasional sale exemption was not applicable, no taxes were due from the taxpayer because the aircraft was never transferred to the taxpayer. The taxpayer premises this argument on two alleged facts. First, Dr. Doe contends that he did not acquire title to the aircraft at the time XYZ transferred title to him by bill of sale since XYZ did not own the Piper aircraft at that

time. Tr. pp. 11, 185, 186. Secondly, he contends that, even if the transfer was a valid change of ownership at that time, the aircraft was never transferred to or owned by the taxpayer. Rather, he alleges, the aircraft was owned by Anywhere Aeronautics II Inc. ("Anywhere"), a company that the taxpayer set up to hold aircraft in order to shield himself from personal liability. Tr. pp. 9, 11, 12, 13, 14, 15, 61, 62, 63, 127, 128, 129, 130, 133, 134, 187, 203, 204, 205, 210, 216, 217, 218; Taxpayer Ex. 9. Before the FAA title records could be corrected to show Anywhere as the owner, the aircraft was sold to XXX Aviation. Therefore, the FAA chain of title never showed Anywhere to be the owner. Tr. pp. 12, 133, 134.

The record shows that XYZ signed an Aircraft Bill of Sale transferring title to the Piper aircraft to the taxpayer on December 12, 1997 and that the taxpayer tendered a check for the aircraft dated this date. Taxpayer Ex. 2, 16. However, AIRPLANES did not sign an Aircraft Bill of Sale transferring title to the Piper aircraft to XYZ until February 27, 1998. Taxpayer Ex. 24. While these facts show that the formalities attendant to title transfer were not scrupulously adhered to, failure to do so does not necessarily determine the passage of ownership. Country Mutual Insurance Co. v. Aetna Life & Casualty Insurance Co., 69 Ill. App. 3d 764 (2nd Dist. 1979). It is the intent of the parties involved, rather than adherence to these formalities, which determines whether a transfer of ownership has in fact occurred. In the Matter of Robinson, 665 F. 2nd 166 (7th Cir. 1981); Country Mutual Insurance Co., *supra*. The facts in this case do not support a finding that the parties intended the transfer of the Piper aircraft on December 12, 1997 to be void as a result of the premature issuance of an Aircraft Bill of Sale covering the Piper aircraft by XYZ. To the contrary, the record is replete with evidence

that both XYZ and the taxpayer considered this transfer of title to the Piper aircraft to be valid, in spite of XYZ's bill of sale dated before title to the aircraft was relinquished by AIRPLANES. Specifically, the taxpayer took possession of the aircraft around the time of this title transfer. Tr. pp. 8, 9; Taxpayer Ex. 20. Moreover, he took no steps to obtain a refund of his payment for this aircraft, upon learning that XYZ's title was not clear when it executed the bill of sale. Instead, both parties took steps to rectify any potential problems with the title to this aircraft with the FAA. Tr. p. 133. Moreover, the problem was successfully rectified because the FAA registered a title transfer from AIRPLANES to XYZ at 2:53 p.m. on July 31, 1998. Taxpayer Ex. 24. This was before it registered a title transfer from XYZ to the taxpayer at 2:54 p.m. on July 31, 1998. Taxpayer Ex. 16. Since the parties intended the title transfer on December 12, 1997 to effect a change in ownership of the aircraft, the Department properly relied upon this transfer as a basis for arriving at its assessment determination.

With respect to the taxpayer's allegation that Anywhere owned the Piper aircraft, rather than the taxpayer, there is insufficient evidence in the record to support this contention. As noted earlier, to rebut the Department's prima facie case, a taxpayer must present books and records to corroborate testimonial allegations. Mel-Park Drugs, *supra*. While Dr. Doe repeatedly asserted that Anywhere owned the Piper aircraft, little documentation to support this contention was produced during the hearing proceedings.

The taxpayer sought to support this claim by introducing into the record an insurance policy showing Anywhere to be the insured party in the event of a claim resulting from injury or damage attributable to this aircraft. Taxpayer Ex. 9. However, this evidence does not establish that Anywhere was the owner of this aircraft, since the

policy expressly states that Dr. Doe is "an insured under … this policy … and shall be included in any loss payment made … ." *Id*. At best, this documentation shows that Anywhere and the taxpayer were joint owners of the Piper aircraft.

The taxpayer also introduced a 1997 tax return purportedly filed by Anywhere showing that this company depreciated the Piper aircraft. Tr. pp. 12, 13; Taxpayer Ex. 17. However, this return was not filed by Anywhere. ABC Inc.., another company that the taxpayer owned, filed this return. Tr. p. 129; Taxpayer Ex. 17.

While the record fails to support the taxpayer's contention that the Piper aircraft was transferred to Anywhere, it fully supports the Department's contention that the aircraft was transferred to Dr. Doe. The record includes documentary evidence showing that on December 12, 1997, XYZ executed an Aircraft Bill of Sale transferring title to the Piper aircraft to Dr. Doe, and that this bill of sale was recorded by the FAA. Taxpayer Ex. 16. The record also contains a cashier's check, dated the same date, for $90,000, payable to XYZ. Taxpayer Ex. 2. Dr. Doe also filed an aircraft registration application on this date. Dept. Ex. 3. The application was signed by the taxpayer under penalty for false statements, and certifies that the taxpayer is the owner of the aircraft. *Id*.

Dr. Doe repeatedly alleges that the transfer of the aircraft from XYZ to him was a mistake, and did not reflect the intent of the parties that the owner of the aircraft be Anywhere. He further alleges that the terms of his contract with XYZ corroborate this claim. Tr. pp. 117, 129. However, the record shows that Dr. Doe completed and signed a registration designating himself as the owner of this aircraft. The registration that the taxpayer completed and executed is inconsistent with any claim that the Piper aircraft was transferred to him by mistake. Whatever any contract between the parties might

have said, Dr. Doe tacitly approved the transfer of the Piper aircraft to himself by signing the aircraft registration form. Given this evidence, and other evidence in the record documenting a transfer of the aircraft to Dr. Doe, I find the taxpayer's contention that the Piper aircraft was owned by Anywhere rather than himself to be without merit.

The taxpayer also argues that, even if he did purchase the aircraft in a non-taxable transaction and was personally liable for tax, the tax base used by the Department is incorrect. In support of this argument, he alleges that the tax base used to assess the aircraft must be reduced by amounts paid for modifications to the aircraft which, by agreement of the parties, were to be paid for from the purchase price amount, and by taxes paid on these modifications. Tr. pp. 9, 10, 11, 70, 71, 72, 73, 92, 93, 114, 115, 138, 139, 140, 141, 142, 143, 144, 146, 147, 167, 168, 274, 275, 276. He contends that the deduction of the costs of modifications and repairs paid out of the sale proceeds reduces the tax base to $50,000, which is $80,000 less than the tax base used in arriving at an assessment. Tr. pp. 167, 168; Taxpayer Ex. 1. To establish this claim, the taxpayer sought to apply Illinois' secondary evidence rule to prove the contents of the original contract between the taxpayer and XYZ. Tr. pp. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111. This rule provides that oral testimony is sufficient to establish the contents of an original writing if the proponent of the evidence can prove: (1) the prior existence of the original; (2) its loss, destruction or unavailability; and (3) the party's diligence in attempting to procure the original. Gillson v. Gulf, Mobile & Ohio R.R. Co., 42 Ill. 2nd 193, 199 (Ill. 1969); Sears, Roebuck & Co. v. Seneca Ins. Co., 254 Ill. App. 3rd 686, 691 (1st Dist. 1993); Poelker v. Warrensburg Latham Community Unit School District No. 11, 251 Ill. App. 3rd 270, 288 (4th Dist. 1993). The taxpayer contends that

this rule must be applied because the taxpayer's copy of the original contract with XYZ to purchase the Piper aircraft is unavailable, and the taxpayer has an independent recollection of its contents. Tr. pp. 106, 107.

The Department objected to the application of the secondary evidence rule to prove that the contract provided for the payment of the costs of modifications to the Piper aircraft from the sale proceeds received from Dr. Doe. Tr. pp. 104, 105, 106, 107. While the taxpayer demonstrated that it did not have a copy of the original contract in its possession, he failed to show that all other copies of the contract were lost, destroyed or unavailable. Specifically, no documentary evidence was produced to show that the taxpayer made any effort to procure other copies of the original or even determine if other copies existed. Such evidence might have included a transmittal letter to XYZ advising it that the contract would be needed for trial, or the issuance of a supoena duces tecum. For these reasons, I determined that Illinois' secondary evidence rule did not apply. Tr. p. 111.

Even if the secondary evidence rule had been applied in this case, allowing proof of the contents of the contract by oral testimony, the terms of the contract alleged by the taxpayer do not show that the use of the entire purchase price as the tax base was incorrect. Since the use tax was imposed on the selling price, in accordance with 35 **ILCS** 105/3-10, the taxpayer implicitly argues that the selling price of the Piper aircraft must be reduced in accordance with the terms of the contract. The taxpayer's contention ignores the plain language of section 2 of the Use Tax Act, 35 **ILCS** 105/2, which provides as follows:

> "Selling price" means the consideration for a sale valued in money … and shall be determined without any deduction on account of the cost

> of property sold, the cost of materials used, labor or service cost or any other expense whatsoever … [.]

Section 2 of the Use Tax Act expressly provides that no deduction can be taken from the gross selling price for "the cost of materials used" or "labor or service cost." Moreover, the Department's regulations construing section 2 of the Use Tax Act specifically state that no deductions from the selling price of tangible personal property are to be allowed for such costs. 86 Ill. Admin. Code § 150.201(e). The only installation and alteration charges that are deductible are charges that are separately agreed upon from the price of the merchandise. 86 Ill. Admin. Code § 130.450, incorporated by reference into the use tax regulations by 86 Ill. Admin. Code § 150.1201. A transaction falling within this regulation would involve two separate agreements, one covering the purchase of tangible personal property and the other covering installation and repair services. *Id*. The record contains no testimony or other evidence that the parties agreed to anything other than a lump sum amount to be paid to purchase the Piper aircraft. The taxpayer does not allege that charges for modifications were separately agreed upon. The testimony reveals only that, subsequent to agreeing on the purchase price, the parties agreed that XYZ would use the sale proceeds to pay for these modifications. Tr. pp. 139, 140. Given the testimony concerning the parties' agreement contained in the record, there would be no legal basis for the taxpayer to reduce the purchase price by amounts paid for modifications to the Piper aircraft even if the secondary evidence rule was applicable in this case.

The taxpayer also contends that the tax base should be reduced by sales taxes paid on the modifications undertaken by XYZ. Tr. pp. 10, 11, 17, 73, 93, 140, 141, 144, 274, 275, 276, 291. 86 Ill. Admin. Code § 150.201(e) expressly addresses the deductibility of

sales taxes in determining the Illinois use tax base. This regulation meticulously enumerates the taxes that may be deducted in determining the Illinois use tax. Conspicuously absent from this regulation is any reference to deductions for tax paid on repairs or modifications to tangible personal property intended for sale. Moreover, there is no other statutory or regulatory authorization for any such deduction.[4]

In sum, even if the contract established that the cost of modifications to the aircraft (including taxes) were to be paid out of the sale proceeds, this would not show that the taxpayer was entitled to deduct such costs in computing the use tax base. There is no legal basis for such deductions under Illinois law.

The taxpayer also challenges the Department's determination that the selling price of the Piper aircraft was $134,200 as determined by the Department. Taxpayer Ex. 1. The Department's auditor testified that the taxpayer failed to provide her with sufficient books and records to allow her to determine the purchase price of the Piper aircraft. Tr. pp. 25, 45, 47, 242. While there is evidence in the record that contradicts this testimony, I find the auditor's testimony to be credible. If a taxpayer does not supply the Department with documentation necessary to substantiate its claims, the Department is justified in using other reasonable methods to estimate the taxpayer's tax liability. Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1st Dist. 1978). In the present case, the taxpayer did not present the auditor with sufficient documentation to prove the sale price of the Piper aircraft. As a result, the auditor estimated the sale price by reviewing the aircraft's Blue Book price and making reasonable assumptions regarding its condition

[4] 35 **ILCS** 105/3-55 allows a credit for sales or use tax paid by a taxpayer to other states on property brought into Illinois. However, this credit is inapplicable to the taxpayer since taxes paid on the modifications undertaken by XYZ were paid by XYZ, not the taxpayer. Taxpayer Ex. 3, 4.

and equipment. Tr. pp. 42, 43, 44, 45, 48, 49, 50, 51, 56, 57, 58; Taxpayer Ex. 11. In this case, the auditor reasonably assumed that the Piper aircraft was in average condition and therefore valued it at $114,000, which is the average retail price for an aircraft of this type. Tr. pp. 42, 44, 45. The auditor also reasonably assumed that the aircraft had up to date equipment valued at $20,200. Tr. pp. 42, 43, 44, 45, 48, 49, 50, 51, 56, 57, 58; Taxpayer Ex. 11. Based on these reasonable assumptions, she valued the Piper aircraft at $134,200. Tr. p. 28.

As previously noted, the Department's correction of a taxpayer's return constitutes *prima facie* proof of the correct amount of tax due. 35 **ILCS** 120/4. However, the Department's prima facie case is a rebuttable presumption. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); DuPage Liquor Store, Inc. v. McKibbin, 383 Ill. 276 (1943). To overcome this presumption, the taxpayer must present evidence that is consistent, probable and identified with its books and records to show that the proposed assessment is not correct. Filichio v. Department of Revenue, 15 Ill. 2d 327 (1958); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826 (1988).

To rebut the Department's determination, the taxpayer testified that, because of the aircraft's deteriorated condition, the purchase price of the Piper aircraft was $90,000 which is less than the average retail price for this model and type of aircraft shown in the Blue Book. Tr. pp. 67, 68, 69, 70, 71, 72, 73, 91, 114, 116, 117, 136, 137, 138, 139, 142, 143. This testimony was corroborated by testimony of Joe Blow, an employee of Anywhere, who also testified that the aircraft was in poor condition when he inspected it in 1997. Tr. pp. 162, 163, 164, 166, 172, 173, 177, 178. During his inspection of the aircraft in anticipation of sale, and during his test flight of this aircraft, he identified

numerous defects. *Id*. These defects are summarized in correspondence between Kevin Dow of XYZ and Joe Blow which has been entered into the record. Taxpayer Ex. 20. In support of his claim, the taxpayer produced a copy of a cashier's check payable to the seller dated December 12, 1997. Taxpayer Ex. 2. The date on this check corresponds with the date on which an Aircraft Bill of Sale from XYZ to the taxpayer was issued. Additional documentation in the record refers to the sale price as $90,000, the amount attested to by the taxpayer. Taxpayer Ex. 6, 10.

I find the testimony of the taxpayer and Joe Blow regarding the price of the Piper aircraft to be credible. Moreover, I find that this testimony is corroborated by documentation, specifically the cashier's check in the amount of $90,000 paid to XYZ on December 12, 1997 (Taxpayer Ex. 2), which is the date the Aircraft Bill of Sale to the taxpayer was issued by XYZ. In this state of the record, with the taxpayer's testimony regarding the condition and value of the aircraft corroborated by documentary evidence, I find that the taxpayer has successfully rebutted the Department's prima facie determination regarding the sale price of the Piper aircraft. Novicki v. Department of Revenue, 373 Ill. 342 (1940). The burden thus shifted to the Department to prove its claims regarding the aircraft's value by competent evidence. *Id*. The Department has failed to do so. Accordingly, I find that the Department's determination of the aircraft's value was successfully rebutted.

WHEREFORE, for the foregoing reasons, it is recommended that Notice of Tax Liability number 00 0000000000000 be reduced to reflect the purchase price of $90,000 and, as revised, be upheld.

Ted Sherrod

Administrative Law Judge

Date: March 25, 2003